



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services (GS), Inc.

File: B-248417.2

Date: October 20, 1992

John Miklich for the protester.
Matthew Pausch, Esq., Defense Logistics Agency, for the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against terms of solicitation for disposal of hazardous waste is denied where solicitation format, which allows the agency to select the disposal method which the contractor is to use on each particular hazardous waste item to be disposed of, is reasonably related to the government's interest in decreasing the risk of long-term environmental liability for hazardous waste.

DECISION

Laidlaw Environmental Services (GS), Inc. protests the terms of request for proposals (RFP) No. DLA200-92-R-0039, issued by the Defense Logistics Agency (DLA) for disposal of hazardous waste generated at Kelly Air Force Base (AFB), Texas.

We deny the protest in part and dismiss it in part.

The solicitation included numerous contract line items (CLINS), each of which concerned a single type of hazardous waste which the contractor is expected to dispose of. For each CLIN, the solicitation listed one or more of the following disposal methods: recycling, destructive incineration, land disposal, or treatment and land disposal. For each disposal method, the solicitation included an estimated quantity of hazardous waste. Under the solicitation as initially issued, the estimates were created simply by dividing the total estimated amount of each type of hazardous waste by the number of disposal methods. As a result, under each CLIN, the solicitation included an identical estimated quantity for each disposal method designated for the particular type of waste. However, after Laidlaw protested, DLA issued solicitation amendment No. 0003 which

changed the estimated quantities for the listed disposal methods under each type of waste. The amended estimates for each disposal method were based on historical data and Kelly AFB's disposal priorities.

Amendment No. 0003 also revised section C.43 of the solicitation which controls the selection of disposal methods under the contract. Section C.43 now states: "During the course of the contract, the Government shall select the disposal method from the choices delineated in the bid schedule. The CLIN selection shall be made by the generator at the time of turn-in."

After Laidlaw protested, four firms, including the protester, submitted proposals by the initial closing date of April 23, 1992. On July 14, pursuant to 31 U.S.C. § 3553(c)(2) (1988), DLA authorized award of the contract notwithstanding the protest. It awarded a contract to U.S. Pollution Control, Inc. on July 21.

Laidlaw's protest includes numerous allegations regarding the terms of the solicitation. Initially, the firm argued that the solicitation would not allow DLA to determine which proposal included the overall low price since the estimated quantities assigned to the various disposal methods under each hazardous waste CLIN did not reflect the actual quantities that the contractor would be required to dispose of under the contract. Although DLA issued solicitation amendment No. 0003, which changed the estimates allotted to each disposal method to reflect Kelly AFB's experience under the previous disposal contract as well as its disposal priorities, Laidlaw continues to argue that the solicitation is flawed.

First, Laidlaw still maintains that the agency cannot determine which proposal will result in the lowest price since, according to the protester, the quantity estimates in the solicitation on which the price evaluation was to be based would not reflect actual performance under the contract.

Second, Laidlaw argues that the solicitation places an unreasonable risk on offerors because the awardee will not be permitted to choose which disposal method to use on a particular hazardous waste item. Laidlaw argues that this format, coupled with the fixed-price contract type employed here, places upon the contractor unreasonable risk and responsibility. Third, Laidlaw argues that the solicitation is structured in a manner that favors the incumbent since, according to the protester, the "quantity estimates for each disposal method reflect the disposal preference of the incumbent."

The contracting agency, not our Office or the protester, is responsible for determining its needs and the best means of meeting those needs since the agency is most familiar with the conditions under which supplies or services are to be used. Kastle Sys., Inc., B-231990, Oct. 31, 1988, 88-2 CPD ¶ 415. Even burdensome requirements are not objectionable, provided they reflect the government's minimum needs. Id. Our Office will not question an agency's assessment of its needs unless we find it to be unreasonable. PTI Servs., Inc., B-225712, May 1, 1987, 87-1 CPD ¶ 459.

DLA explains that it structured the solicitation to allow Kelly AFB to select the disposal method to be used for each item of hazardous waste since the Base is liable for releases of hazardous substances into the environment even after disposal. According to the agency, hazardous waste linked to Kelly AFB has been found in at least four hazardous waste sites around the country and the Base could ultimately be saddled with the costs of cleanup at those sites. DLA argues that the various methods of disposal listed in the solicitation offer different levels of risk of liability and that the Base needs the flexibility to select a method for each particular hazardous waste item, even at increased cost, in order to minimize potential liability.

DLA also maintains that the solicitation allowed it to determine the low priced offer. DLA explains that for evaluation purposes, the price of each proposal was determined by multiplying the unit prices for each disposal method by the estimated quantity for that method and then totaling the extended prices. The agency concludes that this calculation provided a firm basis for comparing the offers and determining the low price.

In addition, DLA disputes Laidlaw's allegation that the solicitation places unreasonable risk on the contractor since it reserves to Kelly AFB the authority to select the disposal method. According to the agency, the amended hazardous waste estimates in the solicitation were based on the best information available and all offerors had the opportunity to price their proposals based on those estimates. DLA also notes that although the Base will select disposal methods under the contract, the contractor will still control all other decisions that effect its price and profit including pickup, storage, treatment and choice of disposal facility.

We think that under the circumstances the solicitation format was a reasonable expression of the Base's needs for disposal services. As DLA explains, the agency sought to have the Base retain the authority to select the disposal method to be used on a particular hazardous waste item in order to reduce the potential for environmental liability.

Laidlaw argues that such liability is not controlled by the method of disposal used on a particular item of hazardous waste, but rather by the professional ethics and abilities of the firm handling the disposal. While clearly the competence and integrity of a contractor handling hazardous waste can affect long-term environmental risk, DLA nonetheless believes that the method of disposal selected for a particular item of hazardous waste--recycling, destructive incineration, land disposal or treatment and land disposal--also is a significant factor. We think the agency's view is reasonable and we therefore have no grounds to object to the government's retention of the authority to select the disposal method as exceeding the Base's legitimate needs.

As far as the alleged inability to determine the actual overall low priced offer under the solicitation, DLA argues that the hazardous waste quantity estimates multiplied by each offeror's proposed unit prices provide a firm basis for comparing the offers and determining the low priced offer. DLA explains that these estimates are based on historical data, including information on actual hazardous waste quantities and anticipated disposal needs. Additionally, DLA provided Laidlaw with a copy of a memorandum and the contracting officer's worksheets explaining how the agency arrived at the quantities included in the solicitation by amendment No. 0003.

Where as here, a contracting agency requests competition for a requirements contract on the basis of estimates, the agency must base its estimates on the best information available. There is no requirement that the estimates be absolutely accurate; rather, the estimated quantities must only be reasonably accurate representations of anticipated actual needs. Danoff & Donnelly; Kensington Assocs., B-243368; B-243368.2, July 26, 1991, 91-2 CPD ¶ 95.

The record does not support Laidlaw's claim that the amended hazardous waste quantity estimates included for each of the various disposal methods in the solicitation are defective. DLA's estimates are based on the most recently available data concerning the usage of the various methods of disposal from the agency's current disposal contract. In addition, the agency explains that in preparing the estimates for the current solicitation it adjusted the disposal data from the earlier contract based on a disposal objective hierarchy that is intended to reflect the Base's concerns about future environmental liability.

Although Laidlaw was given a copy of the information on which the contracting officer based the estimates, the protester has not challenged that historical information and has submitted no evidence that the estimates based on that information are faulty. Although the protester appears to

believe that the estimates are not reflective of the actual quantities to be expected because the agency adjusted the estimates based on concerns about environmental liability, we see nothing inappropriate in that adjustment since the Base plans to consider potential environmental liability in selecting disposal methods under the contract.

We also conclude that the record does not support Laidlaw's contention that the hazardous waste estimates unfairly favor the incumbent on the current disposal contract. Laidlaw argues that the estimates are biased in favor of the incumbent since they reflect disposal methods that the incumbent chose to use on the earlier contract. As explained, however, DLA adjusted the historical information on disposal methods from the earlier contract to reflect the Base's preferences for some disposal methods over others based on environmental concerns.

Laidlaw further argues that the solicitation placed an unreasonable risk on the contractor; its submissions, however, are unclear as to the nature of the risk that it believes results from this solicitation format. The protester states that the solicitation as structured "does not enable a contractor to employ inventiveness, innovation, and/or productivity enhancements in order to maximize profit . . ." and that the contractor "cannot control costs or even perform effectively if the contractor doesn't have control over transportation and/or disposal methods." The solicitation simply reserves to the agency the authority to select the method to be used to dispose of particular hazardous waste items under the contract. There is nothing in the solicitation that would prevent the contractor from using innovation, ingenuity and productivity enhancements consistent with the method of disposal selected by the agency for a particular item of hazardous waste.¹

In any event, there is no requirement that an agency eliminate all uncertainty or risk from a solicitation. Kastle Sys., Inc., supra. To the extent that there are uncertainties as to what exactly will be required under the contract,

¹According to Laidlaw, since the government selects the disposal method, the solicitation "does not allow a contractor the control of his firm-fixed-price contract as intended by FAR [Federal Acquisition Regulation] § 16.202-1." The cited provision simply describes a firm, fixed-price contract and does not prohibit the use of that contract type here. In fact, FAR § 16.202-1 states that the firm, fixed-price contract "places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss."

offerors can take those uncertainties into account in computing their offers.

Laidlaw also argues that as a result of solicitation amendment No. 0005, which was issued after Laidlaw protested, the solicitation is overly restrictive of competition. That amendment deleted deactivation and landfill as a disposal method under the contract for lithium batteries. According to the protester, there is no reasonable basis for eliminating this disposal method.


In response, DLA reports that this method had to be eliminated from the solicitation because land disposal of lithium batteries is no longer permitted by federal regulations. In its comments, Laidlaw failed to respond to the agency's answer to this issue. We thus consider the issue to be abandoned. Electronic Sys. and Assocs., Inc., B-244878, Nov. 13, 1991, 91-2 CPD ¶ 456.

Laidlaw also argues that the solicitation CLINS, each of which relates to a particular type of hazardous waste, are not properly numbered. In this respect, the protester notes that although the solicitation identifies disposal methods for particular types of hazardous waste by subCLIN numbers there are no CLIN numbers in front of the various types of hazardous waste listed in the solicitation. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation which are apparent must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1992). Here, although the numbering scheme which Laidlaw complains of existed in the initial solicitation, the protester did not raise this concern until June 19. Since the initial closing date for receipt of proposals occurred on April 23, this issue is untimely and will not be considered.

Finally, in a submission filed on August 13, Laidlaw argues for the first time that some of the disposal methods listed in the solicitation "do not even comply with current environmental law." Laidlaw includes a single example in its submission. According to Laidlaw, although the solicitation lists treatment and land disposal as a disposal method for lead acid batteries, these batteries are required to be recycled. The amendments which have been issued since the protest was filed did not change the listed disposal methods for lead acid batteries; treatment and land disposal was among the methods permitted when the solicitation was issued. Since this matter was not raised until more than

3 months after the initial closing time for receipt of proposals, it also is untimely and will not be considered.
4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel